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PACIFIC RIDGE BUILDERS, INC. and THOMAS

8 NEWMAN

9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 KEITH F. BELL, Ph.D

13 Plaintiff,

14 vs.

15 PACIFIC RIDGE BUILDERS, INC.;
16 THOMAS NEWMAN; MIKE LEDEIT and
DOES 1 to 20,

17 Defendants.

Case No. 3:19-cv-01307 (JST)

**NOTICE OF MOTION AND MOTION
TO DISMISS AMENDED COMPLAINT**

DATE: June 6, 2019

TIME: 2:00p.m.

COURTROOM: 9
Before the Honorable Jon S. Tigar

18
19 **NOTICE OF MOTION AND MOTION**

20 PLEASE TAKE NOTICE that on Thursday, June 6, 2019, at 2:00 p.m., or as soon
21 thereafter as the matter can be heard, in the Courtroom of the Honorable Jon S. Tigar, located at
22 the San Francisco Courthouse, Courtroom 9 - 19th Floor, 450 Golden Gate Avenue, San
23 Francisco, CA 94102, California, Defendants Pacific Ridge Builders, Inc. and Thomas Newman
24 will and hereby do, move for an order dismissing all of the causes of action in the amended
25 complaint, pursuant to Fed. Rule Civ. Pro. 12(b)(6), for failure to state a claim upon which relief
26 may be granted.

27 The motion will be based on this Notice of Motion and Motion, the Memorandum of
28 Points and Authorities below, and the [Proposed] Order filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The allegations supporting plaintiff's claim that Defendants Pacific Ridge Builders, Inc. ("Pacific") and its President and CEO, Thomas Newman ("Mr. Newman") infringed his copyrighted work and trademark consist of a handful of conclusory statements and unwarranted deductions of fact which ask the Court to draft unreasonable inferences. They do not come close to meeting the requisite pleading standard to state a claim for relief in this matter.

Indeed, all the complaint alleges is that Mr. Newman posted a "poster" of plaintiff's copyrighted work (titled with the trademark) on his personal LinkedIn page along with a statement that referred to exercising with his college buddy when they used to be in training. Even taken as true for purposes of a motion to dismiss, the alleged conduct does not equate to copyright or trademark infringement as a matter of law, and the Court should dismiss the complaint.

II. FACTUAL BACKGROUND

Plaintiff filed his original complaint against defendants Pacific and Newman on March 11, 2019. Dkt. No. 1. The complaint contained causes of action for copyright infringement and trademark infringement based on a single post on Mr. Newman's personal LinkedIn page complimenting a passage he had seen long ago while training in college sports. *See id.*

Defendants timely moved to dismiss the original complaint and plaintiff voluntarily amended. Dkt. Nos. 14, 17. Like the original complaint, the amended complaint contains causes of action for copyright and trademark infringement against Pacific and Newman, and adds Mike LeDeit as a named defendant, alleged to be Pacific's General Superintendent.¹ Dkt. No. 17 at ¶4.

The amended complaint alleges that Plaintiff is a renown sports psychologist and sports performance consultant who owns the copyright to his *Winning Isn't Normal* book (referred to as the "Infringed Work") (Dkt. 17 ¶16) and a trademark for the same phrase (Dkt. 17 ¶23). *See generally*, Dkt. 17 ¶¶ 11-25. It further alleges that plaintiff "markets and sells works derivative of

¹ Pacific and Newman are informed and believe that defendant LeDeit has not yet been served with the complaint.

1 the Infringed Work, such as posters and t-shirts that display a particular passage from Winning
2 Isn't Normal (the 'WIN Passage').” Dkt. 17 ¶ 18.

3 The Complaint alleges that “Defendants” willfully and intentionally infringed plaintiff’s
4 copyright and trademark. *See* Dkt. 17 ¶¶ 36-53. It is premised exclusively on a LinkedIn post
5 made by Mr. Newman on “his” page that included a poster with plaintiff’s copyrighted work and
6 containing his trademark and commentary to it. *Id.* ¶ 27. Indeed, the entire backbone of the
7 amended complaint is contained in Paragraph 27, which reads:

8 On or about April 21, 2018, Defendant Newman posted a direct copy of Dr. Bell’s
9 WINNING ISN’T NORMAL poster complete with Dr. Bell’s copyright
10 watermark on his LinkedIn page. A copy of the WIN poster as posted by Mr.
11 Newman and Mr. LeDeit is attached as Exhibit D. As least as late as August 9,
12 2018, after repeated contacts by Dr. Bell, Mr. Newman’s posting of the WIN
13 poster remains on LeDeit’s LinkedIn page.

14 Exhibit D shows that, above the allegedly infringing “poster,” there is a comment with Mr.
15 Newman’s name reading: “I remember receiving this from a close friend and teammate in college
16 when we were racking up the miles during our summer training runs in Eugene.” Dkt. 17, Exh.
17 D. The same note is visible on Mr. LeDeit’s post. *See id.*

18 The remaining allegations, concerning ownership and control over the LinkedIn Pages and
19 the commercial nature of the post and its purpose, are conclusory legal statements and improper
20 inferences dressed up as facts. They do not and cannot support the infringement claims asserted
21 in the amended complaint.

22 **III. ARGUMENT**

23 **A. Standards Governing this Motion**

24 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a pleading for failure to state a claim.
25 To survive a Rule 12(b)(6) motion, the complaint must “state a claim to relief that is plausible
26 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). “A claim has facial
27 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
28 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.

662, 678 (2009). Although the Court must accept as true a complaint’s well-pleaded facts, “conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper motion to dismiss.” *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

In addition to the pleading itself, a court may consider exhibits attached to a complaint in connection with a motion to dismiss. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (“When a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment.”).

Even a cursory review of the amended complaint and exhibits makes clear that it does not satisfy the pleading standards articulated by the Supreme Court in *Twombly* and *Iqbal*, and dismissal is therefore proper.

B. The Complaint Fails to State a Cause of Action for Copyright Infringement

To state a claim for direct copyright infringement, a plaintiff must “plausibly allege” two things: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–1117; *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

As an initial matter, the amended complaint fails to state a claim against Pacific for direct copyright infringement because it does not allege that Pacific copied anything, or violated any of plaintiff’s other exclusive rights under the Copyright Act. *See* 17 U.S.C. §§ 106, 501(a). While the complaint strategically groups Pacific and Newman together by referring to them (along with defendant LeDeit and the Doe defendants) as (“Defendants”), the alleged “copying” and “public display” was on Newman’s (and LeDeit’s) personal LinkedIn page, not on the Pacific LinkedIn page. *See* Dkt. 17 ¶ 28. The amended complaint does not allege any conduct on the part of Pacific, only that Newman is the company’s president and CEO, and LeDeit, its superintendent. *See* Dkt. 17 ¶ 28-29.

1 Nor does the Complaint contain any factual or legal elements to state a claim against
2 Pacific for contributory or vicarious copyright infringement. Plaintiff's allegations concerning
3 Pacific's purported financial benefit from Newman's (and LeDeit's) personal LinkedIn page, and
4 control over the page are legal conclusions with no factual support. *See* Dkt. 17 ¶ 28-30. Courts
5 "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550
6 U.S. at 555. Moreover, if taken as true, these conclusory allegations still do not state a claim
7 upon which relief could be granted. The Court should dismiss the copyright claim against Pacific
8 on this basis.

9 Additionally, even if the posting could somehow be attributed to Pacific for purposes of
10 this motion, the Court should dismiss the copyright infringement claim against both defendants
11 based on fair use. "[T]he fair use of copyrighted work, including such use by reproduction...for
12 purposes of...comment, is not an infringement of copyright." 17 U.S.C. §107. In determining
13 whether the use made of a work in any particular case is a fair use the factors to be considered
14 shall include-- (1) the purpose and character of the use, including whether such use is of a
15 commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted
16 work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as
17 a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted
18 work.

19 As Exhibit D to the Amended Complaint shows, Newman posted an image of the WIN
20 passage on his personal LinkedIn page, with a comment about receiving it during college days
21 training with his buddy. Dkt. 17. There is no allegation that the use was commercial in nature
22 (beyond a recitation of that statement without any facts); rather it merely shows Mr. Newman
23 sharing a fond memory.

24 As to the nature of the copyrighted and work and the amount posted; although the image
25 is a creative expression, the "poster" posted by Newman was part of a book that he read, and he
26 did not post the entire book. Moreover, according to the amended complaint, Mr. Newman did
27 not even post the entirety of plaintiff's popular copyrighted passage. *See* Dkt. 17 at ¶31.

28 Lastly, there is no allegation that Defendants made any financial gain as a result of the

1 post, and there is no conceivable economic to harm plaintiff's existing or future sales from this
 2 posting as to the effect of the use upon the potential market for or value of the copyrighted work.
 3 As the amended complaint shows, Newman painted the excerpt in a positive light which
 4 essentially endorsed plaintiff's work. This contradicts plaintiff's allegation that people will not
 5 purchase plaintiff's book or other materials that incorporate the WIN passage because of the
 6 alleged infringement. *Compare* Dkt. 17 ¶32 with Dkt. 17, Exh. D. A court may disregard
 7 allegations in the complaint if contradicted by facts established by reference to documents
 8 attached as exhibits to the complaint. *Seven Arts Filmed Ent'mt Ltd. v. Content Media Corp.*
 9 *PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (courts are "not required to accept as true allegations
 10 that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or
 11 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 12 inferences") (dismissing copyright infringement lawsuit on a Rule 12(b)(6) motion); *see also*
 13 *Sprewell v. Golden State Warriors*, 266 F3d 979, 988 (9th Cir. 2001).

14 The Court should dismiss the cause of action for copyright infringement.

15 **C. The Complaint Fails to a State Cause of Action for Trademark Infringement**

16 A cause of action for federal trademark infringement will lie where "the defendant's use of
 17 the same or similar mark [to that of the plaintiff] would create a likelihood of consumer
 18 confusion." *Mintz v. Subaru of America, Inc.*, No. 16-CV-03384-MMC, 2016 WL 5909360, at *1
 19 (N.D. Cal., Oct. 11, 2016) (dismissing trademark claim at the pleading stage), *aff'd* 716
 20 Fed.Appx. 618 (9th Cir. 2017). This means that "that the public is likely to be somehow confused
 21 about the source or sponsorship of [the defendant's goods] and somehow to associate that
 22 [product] with [the plaintiff]." *Id.* (citing *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*,
 23 174 F.3d 1036, 1053 (9th Cir. 1999). "The confusion must be probable, not simply a possibility."
 24 *Id.* (citing *Murray v. Cable Nat'l Broadcasting Co.*, 86 F.3d 858, 861 (9th Cir. 1996)).

25 **1. There is No Allegation of Trademark Use**

26 Infringement of a federally registered trademark under the Lanham Act requires that the
 27 "use" by the defendant[s] be a "use in commerce" and "in connection with the sale, offering for
 28 sale, distribution, or advertising of any goods or services on or in connection with which such use

1 is likely to cause confusion, or to cause mistake, or to deceive.” 4 McCarthy on Trademarks and
 2 Unfair Competition § 25:53 (5th ed.) (citing 15 U.S.C §1114); *see also Marvel Enterprises, Inc.*
 3 *v. NCSoft Corp.*, No. CV 04-9253RGKPLAX, 2005 WL 878090, at *5 (C.D. Cal., Mar. 9, 2005)
 4 (granting motion to dismiss because complaint did not allege that the trademarks were used in
 5 commerce in connection with any sale or advertising of goods and services).

6 There is no question that the amended complaint does not – and cannot – satisfy the “use”
 7 requirement sufficient to state a cause of action for trademark infringement. Indeed, Newman’s
 8 posting of a “poster” on his personal LinkedIn page along with the comment: “I remember
 9 receiving this from a close friend and teammate in college when we were racking up the miles
 10 during our summer training runs in Eugene” (Dkt. 17, Exh. D), is not use in commerce in
 11 connection with the sale, offering for sale, distribution, or advertising of any goods or services.
 12 “Reference to another's trademark is not actionable if it does not occur in connection with the
 13 offer of goods or services, i.e., if the ‘use’ made of the mark is not ‘trademark use.’” 6 Callmann
 14 on Unfair Comp., Tr. & Mono. § 22:74 (4th Ed.).

15 **2. Confusion is Unlikely as a Matter of Law**

16 Even if the amended complaint sufficiently alleged use, the facts as alleged (taking into
 17 account the attached Exhibit D) make clear that there is no likelihood of confusion, nor can
 18 plaintiff allege it. “Generally, a determination of whether there exists a likelihood of confusion
 19 requires examination of eight different ‘factors,’ including the ‘similarity of the conflicting
 20 designations,’ the ‘marketing channels used,’ and ‘evidence of actual confusion.’ *Mintz*, 2016 WL
 21 5909360, at *1 (quoting *Brookfield Communications*, 174 F.3d at 1053-54). While “such
 22 determination is often made in the context of a motion for summary judgment” in some instances
 23 “the question of whether a likelihood of confusion exists can be determined at the pleading stage
 24 and based on a consideration of less than all of the factors, such as where the parties ‘have
 25 obviously dissimilar marks’ or where the ‘goods’ or ‘services’ of the parties are ‘unrelated.’
 26 *Mintz*, 2016 WL 5909360, at *1.² “If the court determines as a matter of law from the pleadings

27 _____
 28 ² The Ninth Circuit looks to “the following factors for guidance in determining the likelihood of confusion: similarity of the conflicting designations; relatedness or proximity of the two companies' products or services; strength of

1 that the goods are unrelated and confusion is unlikely, the complaint should be dismissed.”
 2 *Murray*, 86 F.3d at 860.

3 Here, confusion is unlikely because the goods/services of the parties are unrelated.
 4 Plaintiff touts himself as “an internationally recognized sports psychology and performance
 5 consultant” who has published books and articles “relating to sports psychology and sports
 6 performance.” Dkt. 17 at ¶11-14. As indicated by its name, defendant Pacific Ridge Builders is a
 7 construction company; defendant Thomas Newman is its president and CEO. Dkt. 17 ¶2-3.

8 Plaintiff’s “recognition as an authority in sports psychology and sports performance”
 9 (Dkt. 17 ¶ 20) and his WINNING ISN’T NORMAL trademarked phrase for printed goods “in the
 10 field of sports, fitness, and competitive performance and psychology” (Dkt. 17, Exh. C) is not
 11 likely to be confused with Pacific’s construction services or Mr. Newman’s employment as
 12 Pacific’s president and CEO (or Mr. LeDeit’s employment as Pacific’s superintendent). This is
 13 particularly true because, as stated above, there is no commercial use of the trademark. The
 14 complaint’s bald allegation that the alleged “infringements” were “commercial in nature” in that
 15 “they were meant to publicize and promote defendant Pacific” (Dkt. 17 ¶ 30) do not satisfy the
 16 plausibility requirement and are merely unwarranted deductions of fact and unreasonable
 17 inferences that the Court is not required to accept as true in ruling on this motion. *See Seven Arts*,
 18 733 F.3d at 1254; *Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).

19 Plaintiff attempts to save the trademark claim by alleging that “[r]eaders are likely to be
 20 confused so as to infer that the text shown in the post was originated by the Defendants, rather
 21 than by Plaintiff, and/or that the infringing publication and post were affiliated with, sponsored,
 22 or approved by Plaintiff.” Dkt. 17 ¶ 48. But this last-hope allegation demonstrates that the claim
 23 fails as a matter of law.

24 It is not facially plausible that readers would believe that the text or post was originated by
 25 the Defendants. As alleged in the amended complaint itself, “Defendant Newman posted a direct
 26

27 [plaintiff’s] mark; marketing channels used; degree of care likely to be exercised by purchasers in selecting goods;
 28 [defendant’s] intent in selecting its mark; evidence of actual confusion; and likelihood of expansion in product lines.
Brookfield Communications, 174 F.3d 1036, 1053–1054.

1 copy of Dr. Bell’s WINNING ISN’T NORMAL poster *complete with Dr. Bell’s copyright*
 2 *watermark* on his LinkedIn page.” Dkt. 17 ¶ 27 (emphasis added) and Exh. D (poster fully
 3 attributed to Dr. Bell). The post of the “poster” taken as a whole, is attributed to plaintiff, so there
 4 is no likelihood of confusion as to its source. Nor is a likelihood of confusion as to affiliation
 5 sponsorship or approval plausible when reviewing the actual allegedly infringing post, not just the
 6 artful pleading’s characteristic of it. As the post itself makes clear, it shares the personal fond
 7 memory of material received “from a close friend and teammate in college.” Dkt. 17, Exh. D.

8 Even at the pleading stage, plaintiff’s trademark infringement claim should be dismissed
 9 for failure to state a claim upon which relief can be granted. *See, e.g. Murray.*, 86 F.3d at 861
 10 (affirming district court order dismissing trademark claim, finding that because the “parties’
 11 services are unrelated, there is no likelihood of consumer confusion as a matter of law”).

12 **3. The Complaint Fails to Plead Secondary Infringement and There is None**

13 Lastly, the trademark claim fails as to Pacific because there are no factual allegations that
 14 Mr. Newman’s (or Mr. LeDeit’s) individual LinkedIn page, or the posts made therefrom are
 15 associated with or controlled by Pacific such that Pacific would be secondarily liable for the
 16 alleged infringement. Rather, the allegations in the amended complaint as to Pacific’s affiliation
 17 with or control over its employees’ LinkedIn pages are simply conclusory, unwarranted
 18 deductions of fact and unreasonable inferences that do not save this improper claim from
 19 dismissal. *See Seven Arts*, 733 F.3d at 1254. *See* Dkt. 17 ¶¶ 28-29.

20 Moreover, for there to be secondary liability for trademark infringement there must be a
 21 direct infringement. *See* 4 McCarthy on Trademarks and Unfair Competition § 25:17 (5th ed.)
 22 (by definition, there can be no liability for contributory infringement or vicarious infringement
 23 unless there is direct infringement). As discussed above, there is no direct infringement here.

24 **D. The Court Should Grant the Motion Without Leave to Amend**

25 Because further amendment would not cure the deficiencies in the amended complaint the
 26 Court should dismiss it without leave to amend. “A district court can deny leave ‘where the
 27 amendment would be futile ... or where the amended complaint would be subject to dismissal.’ ”
 28 *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005). Moreover, “[a]

1 district court's discretion to deny leave to amend is 'particularly broad' where the plaintiff has
 2 previously amended." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (citing
 3 *Sisseton–Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir.1996)).

4 Dismissal of a copyright claim without leave to amend is appropriate where there can be
 5 no infringement as a matter of law. *See, e.g. Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1123-24
 6 (9th Cir. 2018) (affirming district court's Rule 12(b)(6) dismissal of copyright claim without
 7 leave to amend; amendment would have been futile because the allegedly infringing works are as
 8 a matter of law not substantially similar, and nothing disclosed during discovery could alter that
 9 fact). As discussed above, there is there is no copyright infringement as a matter of law.

10 Dismissal of a trademark claim without leave to amend is also appropriate where, as here,
 11 the plaintiff cannot state a plausible cause of action for trademark infringement. *See e.g. Eastland*
 12 *Music Group, LLC v. Lionsgate Entertainment, Inc.*, 707 F.3d 869, 871-872 (7th Cir. 2013)
 13 (dismissal without leave to amend proper where the trademark infringement allegations were "too
 14 implausible to support costly litigation."); *see also Podiatrist Ass'n, Inc. v. La Cruz Azul De*
 15 *Puerto Rico, Inc.*, 332 F.3d 6 (1st Cir. 2003) (dismissing claim because the plaintiffs' allegations
 16 "do not implicate the use of any particular advertising or promotional medium" and that
 17 "omission opened the Lanham Act count to dismissal under Rule 12(b)(6)"). Because Defendants
 18 did not use plaintiff's trademark, and confusion is unlikely there is no possible theory that would
 19 open up the door to their liability for infringement under the Lanham Act.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Defendants respectfully request that the Court dismiss the
 22 Amended Complaint in its entirety.

23 DATED: April 30, 2019

HANSEN LAW FIRM, P.C.

24 By: /s/ Sarah Wager

25 SARAH WAGER
 26 Attorney for Defendants
 27 PACIFIC RIDGE BUILDERS, INC. and
 28 THOMAS NEWMAN